

LUU (Migration) [2017] AATA 2321 (9 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Duc Dat LUU
CASE NUMBER:	1619969
DIBP REFERENCE(S):	BCC2015/429782
MEMBER:	Michael Cooke
DATE:	9 November 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations

Statement made on 09 November 2017 at 2:38pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Genuine spousal relationship – Joint finances – Shared household – Social recognition of relationship

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cl 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 11 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 9 February 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the parties did not meet the definition of spouse in s.5F of the Act.
4. The applicant appeared before the Tribunal on 9 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsoring partner. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by his registered migration agent.
6. A comprehensive submission and array of additional information pursuant to reg.1.15A(3) was submitted to the Tribunal prior to the hearing (T1, ff.107-121).
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the parties can meet the definition of spouse in s.5F of the Act.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. On the evidence (an Australian Marriage Certificate), the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
12. The Tribunal is satisfied that the parties have a joint bank account and share expenses.
 - Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
 13. The parties live in a large shared home with other family members. They have no children.
 - Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
 14. The Tribunal has been given copious evidence of social recognition of the relationship by friends and family members.
 - Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
 15. The parties are a young couple and at present are suffering a long distance marriage as the sponsor is completing a compulsory university year at a Chinese University. They informed that they had little money but family members had helped out when necessary. In this situation they have drawn emotional support from each other. They insisted in oral evidence that their relationship is for the long-term.
 - Any other relevant considerations.
 16. The Tribunal has had the benefit of a well-prepared recent submission and copious additional information pursuant to reg.1.15A(3). This has allowed the Tribunal to be fully informed about the relationship on review.
 17. The Tribunal has considered r.1.15A(3) matters and finds the parties have a mutual commitment to a shared life to the exclusion of others; a genuine and continuing relationship; and they live together and not separately and apart on a permanent basis. They meet the criteria in s.5F(2)(b)-(d) of the Act.
 18. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
 19. Therefore, the applicant meets cl.820.211(2)(a) and cl.820.221.

20. Before concluding the time of decision criterion (cl.820.221) is met, the Tribunal finds that the applicant was sponsored by her sponsoring partner at time of application and continues to be so sponsored at time of decision meeting cl.cl.820.211(2)(c). He was also a substantive visa holder and met the Schedule 3 requirements in cl.820.211(2)(d). These clauses must be met before concluding that cl.820.221 is met.
21. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

22. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations

Michael Cooke
Senior Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).